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No. 83-524

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

WYNMOOR LIMITED PARTNERSHIP and
WYNMOOR COMMUNITY COUNCIL,

Appellants

v.

COCONUT CREEK CABLE T.V., INC., WYNMOOR HOMEOWNERS ASSOCIATION, INC., a Florida corporation not for profit; MARTINIQUE VILLAGE II-C CONDOMINIUM ASSOCIATION, INC., a Florida corporation not for profit, and NORMAN RICHMAN,

Appellees

On Appeal from the District Court of Appeal
for the State of Florida, Fourth District

MOTION TO DISMISS OR AFFIRM

DAVIS W. DUKE, JR.*
McCUNE, HIAASEN, CRUM,
FERRIS & GARDNER, P.A.
Post Office Box 14636
Fort Lauderdale, FLA 33302
Telephone: (305) 462-2000

BARRY F. SCHWARTZ
WOLF, BLOCK, SCHORR &
SOLIS-COHEN
12th Floor, Packard Bldg.
15th & Chestnut Streets
Philadelphia, PA 19102
Telephone: (215) 977-2228
Attorneys for Appellee
COCONUT CREEK CABLE
T.V., INC.

*Counsel of Record

DESIGNATION OF CORPORATE RELATIONSHIPS

Appellee COCONUT CREEK CABLE TV, INC., is a Florida corporation. It is a subsidiary of TeleCable Technologies, Inc., a Virginia corporation. TeleCable Technologies, Inc., is a subsidiary of TeleCable Corporation, also a Virginia corporation. TeleCable Corporation is a subsidiary of Landmark Communications, Inc., a Virginia corporation.

TABLE OF CONTENTS

	Page
Designation of Corporate Relationships	i
Table of Authorities	iii
Motion to Dismiss or Affirm	1
Statutory Provisions	2
Statement of the Case	3
Argument	8
Conclusion	14
Appendix	1a
Letter of July 17, 1980 from Computer Cable T.V., Inc. to Appellee, Coconut Creek Cable T.V., Inc.	1a
Ordinance No. 131-79	2a

TABLE OF AUTHORITIES

Cases:	Page
Bachtel v. Wilson, 204 U.S. 36 (1907)	12
Berea College v. Kentucky, 211 U.S. 45 (1908) . .	13
Cramp v. Board of Public Instruction of Orange County, Florida, 368 U.S. 278 (1961)	11
Department of Legal Affairs v. District Court of Appeal, 5th District, 434 So.2d 310 (Fla. 1983)	12
Enterprise Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157 (1917)	13
Fox Film Corp. v. Muller, 296 U.S. 207 (1935) . .	13
Herb v. Pitcairn, 324 U.S. 117 (1945)	12, 13
Murdock v. Memphis, 20 Wall. (U.S.) 590 (1874) .	13
North Dakota Pharmacy Board v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973)	9, 10
Radio Station W.O.W., Inc. v. Johnson, 326 U.S. 120 (1945)	10
Ridgway v. Ridgway, 454 U.S. 46 (1981)	13
Stembridge v. Georgia, 343 U.S. 541 (1952) . . .	12
Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977)	12, 13
 Statutes:	
28 U.S.C. §1257(2)	2, 3, 9
Fla. Stat. §718.1232	2, 3, 6, 8, 9, 10, 11, 12
Ordinance No. 131-79, City of Coconut Creek . .	4, 2a

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**COCONUT CREEK CABLE T.V., INC., WYNMOOR
HOMEOWNERS ASSOCIATION, INC., a Florida corpo-
ration not for profit; MARTINIQUE VILLAGE II-C
CONDOMINIUM ASSOCIATION, INC., a Florida corpo-
ration not for profit, and NORMAN RICHMAN,**

Appellees

**On Appeal from the District Court of Appeal
for the State of Florida, Fourth District**

MOTION TO DISMISS OR AFFIRM

Appellee, COCONUT CREEK CABLE T.V., INC., moves this Court to dismiss the appeal herein or, in the alternative, to affirm the original judgment of the Fourth District Court of Appeal of Florida on the following grounds:

1. The first purported federal question presented by Appellants was never decided by the Florida Courts and therefore no state court has rendered a final decision on that question as required by 28 U.S.C. §1257;
2. The state courts decided Appellants' second purported federal question on adequate and independent state grounds; and
3. Appellants lack standing to raise the purported federal questions before this Court.

STATUTORY PROVISIONS

The jurisdictional statute under which this appeal is brought, 28 U.S.C. §1257, provides in pertinent part:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

City of Coconut Creek Ordinance No. 131-79 is set forth in full in the Appendix to this motion.

Section 718.1232, Florida Statutes, provides:

No resident of any condominium dwelling unit, whether tenant or owner shall be denied access to any available franchised or licensed cable television service, nor shall such resident or cable television service be required to pay anything of value in order to obtain or provide such service except those charges normally paid for like services by residents of, or providers of such services to, single family homes within the same franchised or licensed area and except for installation charges as such charges may be agreed to between such resident and the provider of such services.

STATEMENT OF THE CASE

This case, as decided by Final Judgment and Decree (hereafter "Decree") of the Circuit Court of Broward County, Florida and affirmed *per curiam*, without opinion by the District Court of Appeal of the State of Florida, Fourth District, is not appealable to this Court pursuant to 28 U.S.C. §1257(2).

Appellants suggest two questions for this Court's review. (Juris. St. p. i.)¹ As for the first, the question was not actually decided below; therefore no state court has rendered a final appealable decision on the question. As for the second, the decision appealed from rests on adequate state and common law grounds. Finally, Appellants lack sufficient standing to raise either question at all.

COCONUT CREEK CABLE'S Complaint seeking the right of entry to WYNMOOR VILLAGE (hereafter "WYNMOOR") was premised upon (1) the common law; (2) its franchise from the city of Coconut Creek, Florida; and (3) Section 718.1232, Florida Statutes. In addition, it sought an injunction to prevent Appellants, WYNMOOR LIMITED PARTNERSHIP (hereafter "DEVELOPER") and WYNMOOR COMMUNITY COUNCIL, INC. (hereafter "COMMUNITY COUNCIL"), from interfering with that right. As stated in the Decree appealed from:

The basic issue in this case [was] whether plaintiff [was] entitled under law to access or entry into Wynmoor Village for the purpose of making its available cable television services accessible to the residents thereof.

App. 2.²

1. "Juris. St." refers to Appellants' Jurisdictional Statement.

2. "App.____" refers to the Appendix submitted with Appellants' Jurisdictional Statement.

"I. App.____" refers to the Appendix submitted with Motion to Dismiss or Affirm of Co-Appellees.

"P. App.____" refers to the Appendix submitted with this Motion to Dismiss or Affirm.

That narrow issue was resolved in favor of COCONUT CREEK CABLE. It was the *only* issue decided in this case and the decision was based on adequate state grounds. The Decree expressly did not address any right of COCONUT CREEK CABLE to "install" cable television lines within WYNMOOR VILLAGE either with or without compensation.

In the Decree, the trial court summarized some of the evidence which it found decisive. WYNMOOR is a condominium project constructed and sold by the DEVELOPER in the City of Coconut Creek, Florida. At the time of trial, WYNMOOR consisted of about 3,500 condominium dwelling units, organized into approximately thirty-nine separate condominiums, each governed by its own "ASSOCIATION", together with certain recreational and other facilities used in common by all WYNMOOR unit owners or residents (hereafter "COUNCIL PROPERTIES"). The COUNCIL PROPERTIES consisted of, among other things, the wall surrounding WYNMOOR and its two security gates, as well as the system of roadways connecting the various parts of the project one to another and with the outside world. App. 2-3. The COUNCIL PROPERTIES were controlled by the COMMUNITY COUNCIL on behalf of and for the benefit of its non-voting members, the WYNMOOR unit owners. App. 2 and 7.

COCONUT CREEK CABLE is a provider of cable television services variously described as "satellite" or "premium channel" programming, to which the City of Coconut Creek, Florida (hereafter "CITY"), awarded a Franchise on January 24, 1980 to service the entire CITY, including WYNMOOR. App. 2-3. Ordinance No. 131-79 (hereafter "FRANCHISE") is set out in the Appendix hereto. P. App. 2a-22a. Among other things, the Franchise granted COCONUT CREEK CABLE the exclusive right to "to erect, construct, maintain and operate a CATV System within the CITY", and obligated it to commence construction promptly and begin servicing

customers under a rigid schedule designed to ensure service to ninety-five percent of the CITY's residential units ninety days thereafter. P. App. 4a-5a, 6a.³

The only cable television services available to WYNMOOR in July of 1980 were provided by one of the DEVELOPER's wholly owned subsidiaries, COMPUTER CABLE T.V. COMPANY (hereafter "COMPUTER"), pursuant to mandatory contracts imposed by the DEVELOPER upon each purchaser. These contracts, however, covered only a security alarm system and connections to a "master antenna" which distributed commercial or "off-the-air" programming. No premium channel cable television services of the type offered by COCONUT CREEK CABLE could be obtained by WYNMOOR residents, in spite of the fact that they had generally "been expressing a desire to have such services available for at least two years" App. 5.

By July 17, 1980, COCONUT CREEK CABLE had installed its system in the areas of the City surrounding WYNMOOR. On that day the DEVELOPER barred COCONUT CREEK from entering WYNMOOR through instructions given by James Coffey to a security guard. The DEVELOPER had appointed Mr. Coffey as President of both the COMMUNITY COUNCIL (which the DEVELOPER retained the right to control during construction and sometime thereafter) and COMPUTER. App. 2-3, 4. Thereafter, Mr. Coffey wrote to COCONUT CREEK CABLE, solely as President of COMPUTER, and justified the denial of access upon the grounds that (1) WYNMOOR's roads were private and under Appellants' control, and (2) Computer Cable T.V., Inc., provided all cable services to WYNMOOR residents. App. 3. This letter is also set out in the Appendix hereto. P.App. 1a.

Sometime subsequent to COCONUT CREEK CABLE's filing of the present action, the DEVELOPER

3. The validity of the franchise and its stated exclusivity were not issues for determination in the case. App. 2.

arranged to offer to WYNMOOR residents cable television services in competition with COCONUT CREEK CABLE through an entity known as "Earth Star Communications." On this point, the trial court concluded, "In short, Earth Star was granted access as plaintiff was being denied access." App. 5. Three WYNMOOR unit owners testified that they wished to have COCONUT CREEK CABLE'S services available. In addition, the INTERVENORS, seeking to represent WYNMOOR unit owners at large, favored COCONUT CREEK CABLE's right to enter WYNMOOR and contested the legality of Appellants' denial of access as contrary to the residents' wishes and therefore not on their behalf.

In reliance upon the foregoing evidence, the trial court ruled in favor of COCONUT CREEK CABLE, finding that, as a franchised provider of cable television services, it clearly was entitled "under law" to enter WYNMOOR. Rejecting Appellants' reasons for preventing COCONUT CREEK CABLE from entering WYNMOOR, the trial court found that "Defendant's actions in barring plaintiff to date are without legal cause or justification and are, therefore, wrongful." App. 6. As a result, the court concluded that Appellants ". . . should not in the future interfere with plaintiff's [Appellee, COCONUT CREEK CABLE] reasonable efforts to design and plan the installation of its system at Wynmoor and to communicate with and solicit Wynmoor Condominium Associations and residents for service." (Emphasis added.) App. 6.

No right to install cable television lines was granted and the narrow equitable relief afforded was based upon the public interest by virtue of the municipal franchise, the sizeable number of condominium owners affected, and the "public policy" enunciated in Section 718.1232. App. 7. The injunction provided only that:

. . . [Appellants] and their officers, agents, representatives, employees and servants, together with all others encompassed by the scope of Rule 1.610(d),

Florida Rules of Civil Procedure, (collectively "[Appellants]") are hereby forthwith permanently enjoined from denying such entry or access to or otherwise interfering with [COCONUT CREEK CABLE] or its officers, agents, servants, employees or representatives (collectively "[COCONUT CREEK CABLE]") in the exercise of such right of entry and access. The scope and intent of this injunction and decree is such that [COCONUT CREEK CABLE] shall have the right to enter Wynmoor in order to survey and inspect the property for purposes of planning the design and installation of a system to furnish cable television service to the unit owners and residents of Wynmoor and shall have the further right to solicit customers and otherwise negotiate the terms, means and methods of providing service with unit owners, residents, and condominium associations located within Wynmoor. . . .

App. 12.

The trial court felt that it would be premature to consider, let alone mandate, that Appellants or anyone else must permit COCONUT CREEK CABLE to install cable television lines on or over private property.

Such specifics are not now before the Court, and indeed, may not, as a practical matter, ever present an actual problem. Those issues will arise, if at all, only after plaintiff has been granted the right of entry and has had the opportunity to plan a design for its system following discussions with unit owners and their associations and, perhaps, with the developer and the Wynmoor Community Council. In like manner, the court by *this Final Decree does not address the issue of whether plaintiff must be allowed or can be compelled to install any particular cable television system within Wynmoor or any part of Wynmoor. Such matter, should the same become a legal problem at all, will depend upon subsequent events.* (Emphasis added.)

App. 10-11.

ARGUMENT

Appellants have the burden of demonstrating that the questions presented to this Court for review have been finally decided in the courts below as well as the burden of demonstrating that independent and adequate state grounds, such as those that exist in this case, were not the basis for the decision below. In their Jurisdictional Statement, Appellants have not addressed their burden for, as discussed below, they can not meet it.

I. THIS COURT SHOULD DISMISS APPELLANTS' FIRST QUESTION PRESENTED OR ALTERNATIVELY AFFIRM, BECAUSE IT WAS NEITHER EXPRESSLY PASSED ON BELOW NOR RAISED BY THE LANGUAGE OF SECTION 718.1232, FLORIDA STATUTES; THEREFORE, THE FLORIDA COURTS NEVER RENDERED A FINAL DECISION ON THAT QUESTION.

Addressing the present dispute, the Florida trial court wrote, "The basic issue in this case is whether plaintiff is entitled under law to access or entry into Wynmoor Village . . ." App. 2. Therefore, the court

[did] not address the issue of whether plaintiffs must be allowed . . . to install any particular cable system within Wynmoor or any part of Wynmoor. Such matter, should the same become a legal problem at all, will depend upon subsequent events.

App. 10-11.

The lower court expressly declined to interpret or apply Section 718.1232, Florida Statutes, to grant COCONUT CREEK CABLE the right (or obligation) to *install* cable television lines or otherwise permanently occupy the premises of WYNMOOR. Moreover, the statute does not address the installation of cable television lines on or over private property. It simply states:

No resident of any condominium dwelling unit, whether tenant or owner shall be denied access to any

available franchised or licensed cable television service, nor shall such resident or cable television service be required to pay anything of value in order to obtain or provide such service except those charges normally paid for like services by residents of, or providers of such services to, single family homes within the same franchised or licensed area and except for installation charges as such charges may be agreed to between such resident and the provider of such services.

In subsequent proceedings in this case, no Florida appellate court expressed an opinion on the issue. Consequently, the Florida state courts have never decided whether Section 718.1232 permits a permanent physical occupation without compensation.

Nonetheless, Appellants raise the following as the first of their "Questions Presented":

Whether Florida's cable television "access" statute relating to condominiums, Fla. Stat. Section 718. 1232 (1981), which grants to private cable operators the right to install cable television lines over and through private property without provision for compensation, violates the Takings Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

Juris. St. i. In effect, Appellants ask this Court to recognize a construction of the Florida Statute which no Florida court has ever given it.

Appellants merely anticipate something that *may* happen in the future. That anticipation, however, is not sufficient to invoke this Court's jurisdiction under 28 U.S.C. §1257(2). The prerequisite to this Court's jurisdiction, lacking in the case at bar, is that the state courts render a "final decision" on the federal questions presented to the Court.

This Court discussed the ends served by the finality requirement of 28 U.S.C. §1257 in *North Dakota Phar-*

macy Board v. Snyder's Drug Stores, Inc., 414 U.S. 156, 159 (1973):

- (1) it avoids piecemeal review of state court decisions;
- (2) it avoids giving advisory opinions where there may be no real "case" or "controversy" in the sense of Art. III;
- (3) it limits review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs.

See also Radio Station W.O.W., Inc. v. Johnson, 326 U.S. 120, 124-125 (1945).

These purposes can only be served by dismissing Appellants' first question presented or, alternatively, summarily affirming the state court's decision to reserve the issue for a more appropriate time. The Florida courts then would have the opportunity to decide finally whether Section 718.1232, Florida Statutes, authorizes a permanent physical occupation of WYNMOOR without just compensation.

II. THIS COURT LACKS JURISDICTION TO REVIEW APPELLANTS' SECOND "QUESTION PRESENTED" BECAUSE THE STATE COURT DISPOSED OF THAT QUESTION ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

The Florida court found that, under Florida law, Appellant DEVELOPER does not have an exclusive property interest in WYNMOOR's roadways. On the contrary, the trial court found that:

No matter who holds legal title to such roadways, now or in the future, it is clear from the evidence [as opposed to Section 718.1232] that the Wynmoor roads exist for the use and benefit of the Wynmoor condominium unit owners and residents, and those who service them, as well as for the benefit of the DEVELOPER during the period of development.

App. 7. Consequently, the DEVELOPER was found not to have an exclusive property right that entitles it to exclude COCONUT CREEK CABLE from the Wynmoor development, at least as long as COCONUT CREEK CABLE was only surveying and designing a cable system or soliciting condominium residents.

The evidence upon which the court based its finding included public policy, numerous provisions of Florida's Condominium Act (set forth in Intervenor's Appendix), WYNMOOR's condominium documents, as well as COCONUT CREEK CABLE'S Franchise.⁴ Given this evidence, it is clear that the court's finding is an interpretation of the nature of the DEVELOPER's property interest under Florida common law and Florida statutory condominium law. The statute Appellant seeks to draw into constitutional question simply was not dispositive of the only issue actually adjudicated below. Although the court noted that Section 718.1232 also supported Appellee's claim, the court did so unnecessarily. The various other grounds listed above were sufficient to dispose of COCONUT CREEK CABLE's claim.

As a result, this Court has no jurisdiction to hear appellants' second question on appeal. That question asks:

Whether Fla. Stat. Section 718.1232 (1981), construed to allow ingress to private condominium property without the need for invitation, violates the Takings Clauses of the Fifth and Fourteenth Amendments to the United States Constitution as applied to the facts of this case.

Juris. St. i.

4. As the court below found no exclusive property right based on applicable Florida law, and since Appellee's right of entry expressly did not include a right to install cable television transmission lines on or over private property, Appellants cannot make out any cognizable injury. Therefore, they lack standing to raise even the questions they would pose before this Court. See *Cramp v. Board of Public Instruction of Orange County, Florida*, 368 U.S. 278, 282-283 (1961).

Because it found that the DEVELOPER has only a non-exclusive property interest in the roads of the condominium development, the lower court never had to respond to Appellant's challenge. Indeed, it stated:

The Court does not reach the constitutional issues raised by defendants [Appellants here] because the facts of this case do not support such challenges to the validity of Section 718.1232, Florida Statutes.

App. 7.

Furthermore, the adequate and independent state grounds upon which the trial judge relied do not disappear merely because no higher Florida court issued an opinion. Because the Supreme Court of Florida dismissed Appellants' Petition for Review for want of jurisdiction, the Fourth District Court of Appeal became "the highest court in which a decision could be had" in this case. The Fourth District's *per curiam* affirmance, without opinion, provides neither precedent nor guidance as to that court's rationale. *See Department of Legal Affairs v. District Court of Appeal, Fifth District*, 434 So. 2d 310, 312 (Fla. 1983).

As this Court has stated, "Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment. [Citations omitted.]" *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952). *See also Bachtel v. Wilson*, 204 U.S. 36, 40 (1907).

This Court has repeatedly acknowledged that its

"... only power over state judgments is to correct them to the extent that they incorrectly adjudge Federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could

amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945).

Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562, 566 (1977). *Accord Ridgway v. Ridgway*, 454 U.S. 46, 54 (1981).

Accordingly, the Supreme Court "will not review judgments of state courts that rest on adequate and independent state grounds." *Pitcairn*, 324 U.S. at 125 (citing *Murdock v. Memphis*, 20 Wall. (U.S.) 590, 636 (1874); *Berea College v. Kentucky*, 211 U.S. 45, 53 (1908); *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935)). This Court has stated that it has *no jurisdiction* to review state court decisions, such as the Decree, which rest upon a number of state grounds, one of which is not subject to federal challenge, when the unchallenged ground would be dispositive of the case. *Zacchini*, 433 U.S. at 568. Thus, in the present case, this Court lacks jurisdiction to review Appellants second question presented since the state court's interpretation of the Appellant's limited property rights under Florida law are dispositive of the case.

CONCLUSION

Based on the foregoing, the instant appeal should be dismissed for lack of jurisdiction. Alternatively, the decision of the State Court should be summarily affirmed.

Respectfully submitted,

McCUNE, HIAASEN, CRUM, FERRIS
& GARDNER, P.A.
Post Office Box 14636
Fort Lauderdale, FLA 33302
Telephone: (305) 462-2000

/s/ Davis W. Duke, Jr.
Davis W. Duke, Jr.*

WOLF, BLOCK, SCHORR AND
SOLIS-COHEN
12th Floor Packard Building
15th & Chestnut Streets
Philadelphia, PA 19103
Telephone: (215) 977-2228

/s/ Barry F. Schwartz
Barry F. Schwartz

Attorneys for Appellee
COCONUT CREEK CABLE T.V., Inc.

*Counsel of Record

APPENDIX

1a

APPENDIX

COMPUTER CABLE T.V., INC. AT WYNMOOR
3333 Coconut Creek Parkway
Coconut Creek, Florida 33066
Telephone: 971-3500

CERTIFIED MAIL

July 15, 1981

Mr. Anthony J. Genova
President
Margate Video Systems, Inc.
Post Office Box 63-4669
Margate, Florida 33063

Dear Mr. Genova:

I have received your letters dated July 13th informing us that you were going to commence the installation of cable within Wynmoor on July 17th. Please be informed that all roads within Wynmoor Village are private roads and you do not have any authorization to install cable upon any property within Wynmoor Village. Please be advised that Computer Cable T.V., Inc. provides all cable services to the residents of Wynmoor Village.

Very truly yours,

COMPUTER CABLE T.V. INC.
/s/ James J. Coffey
JAMES J. COFFEY
President

JJC:tg
cc: Howard Goldberg
Robert Shapiro, Esq.
Glenn Cardoso
Ken Gart

ORDINANCE NO. 131-79

AN ORDINANCE GRANTING AN EXCLUSIVE FRANCHISE TO COCONUT CREEK CABLE T.V., INC., A FLORIDA CORPORATION TO CONSTRUCT, OPERATE AND MAINTAIN A CABLE TELEVISION TRANSMISSION SYSTEM IN THE CITY OF COCONUT CREEK, FLORIDA; PROVIDING FOR REGULATION BY THE CITY; PROVIDING FOR INITIAL RATES AND CHARGES; PROVIDING FOR RATE INCREASES; PROVIDING FOR A FRANCHISE FEE TO BE PAID TO THE CITY; PROVIDING FOR ADDITIONAL OBLIGATIONS OF FRANCHISEE; AND FOR OTHER PURPOSES.

WHEREAS, the City of Coconut Creek, Florida, did conduct a full, open and public hearing upon prior notice and opportunity of all interested parties to be heard, and

WHEREAS, careful consideration was given to the qualifications of all applicants, including their legal, character, financial and technical qualifications and the adequacy and feasibility of their construction arrangements;

NOW, THEREFORE, THE CITY OF COCONUT CREEK HEREBY ORDAINS:

SECTION 1: SHORT TITLE. This Ordinance shall be known and may be cited as the Coconut Creek Cable Television Transmission Franchise Ordinance.

SECTION 2: DEFINITIONS. For the purpose of this Ordinance, the following terms, phrases, words and derivations shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural number include the singular number, and words in the singular

number include the plural number. The word "shall" is always mandatory and not merely directory.

- (a) "City" is the City of Coconut Creek, Florida.
- (b) "City Council" is the City Council of the City of Coconut Creek, Florida.
- (c) "CATV" shall mean a system for transmission of audio signals and visual images by means of electrical impulses, including cable T.V., M.D.S., S.T.V. and such ancillary services as pay television and cable communications such as two-way cable.
- (d) "Company" shall be Coconut Creek Cable T.V., Inc.
- (e) "Developed Area" shall mean any area within City from Sample Road South, and all areas within the City which have a minimal density of seventy-five dwelling units per street mile from Sample Road.
- (f) "Gross Subscriber Revenues" shall include any and all revenues received by the Company from the Basic Monthly Service charge paid by Subscribers in the City, but Gross Subscriber Revenues shall not include any refunds or credits made to Subscribers or any taxes imposed on the services, furnished by Company, nor shall it include revenue from "auxiliary" services such as pay-cable, advertising, leased channels, emergency alert protection, or any cable communications (e.g. two-way).
- (g) "Franchise" shall mean the exclusive authorization granted hereunder by the City to install, operate, and maintain a CATV System and furthermore, to construct, operate and maintain a CATV System upon the streets, alleys, canals, easements, public ways and places of the City.

- (h) "Franchise Area" shall include the present territorial limits of the City and any territory henceforth added thereto during the term of this Ordinance.
- (i) "Subscriber" shall mean any person receiving for any purpose the service of the CATV System from the Company herein for the payment of a fee.
- (j) "Cable Television System or System" shall mean a system of antennas, cables, amplifiers, towers, microwave links, waveguides, satellites, or any other conductors, converters, equipment or facilities designed and constructed for the purpose of producing, receiving, amplifying, storing, processing or distributing audio, video, digital or other forms of electronic or electrical signals capable of being transmitted by wire, cable or radio to subscribing members of the public who pay for such service.
- (k) "MDS" shall mean multiple distribution system.
- (l) "STV" shall mean subscription television signal.
- (m) "Federal Communications Commission or FCC" shall mean that agency as presently constituted by the United States Congress or any successor agency authorized by the Congress to regulate cable television systems.

SECTION 3: FRANCHISE GRANT. In consideration of the faithful performance and observation of the conditions and reservations herein specified, and in consideration of the Company's legal, character, financial, technical and other qualifications, and the adequacy and feasibility of its construction arrangements, and further, in consideration of the payments of the amounts provided herein, the exclusive right is hereby granted to Company, its successors, assigns or designees, to erect,

construct, maintain and operate a CATV System within the City, in, under, over, along, across and upon streets, lanes, avenues, sidewalks, alleys, bridges, canals, public places, and all public easements, including canal maintenance and drainage easements over which the City exercises jurisdiction, for the purpose of transmission and distribution of audio and visual impulses and radio and television energy, including cable T.V., M.D.S., S.T.V. and such ancillary services as pay television and cable communications such as two-way cable, in accordance with the laws and regulations of the United States of America, the State of Florida, and the ordinances and regulations of the City for the period provided for in the Ordinance. The right of use and occupancy of public property and public easements for the purpose herein set forth shall be non-exclusive; provided the City shall not grant the same use of public property or easements to any person or entity for the purpose of operating a CATV System at any time during the period of this Ordinance, or any renewal period. City reserves the right to grant a similar use of public property to other utilities, such as, but not limited to electric, telephone, gas, water and waste water, etc., utilities.

SECTION 4: INITIAL SURETY BOND. The Company shall within sixty (60) days of the effective date of this Ordinance post with the City a surety bond in the amount of \$5,000, conditioned upon compliance with Section 5 hereof. Said bond will remain in full force and effect for a period of one year. However, the City may require said surety bond to be renewed for successive one year periods to insure continued compliance with this Ordinance.

SECTION 5: CONSTRUCTION AND INSTALLATION.

- (a) Company shall begin customer installation within thirty (30) days after all of the following occur:

1. This Ordinance becomes law.
 2. Company shall have obtained necessary permits including but not limited to pole attachment permits from Southern Bell Telephone and Telegraph and Florida Power and Light.
 3. Company shall obtain street cut permits from City.
 4. Registration has been filed with F.C.C. and no objections have been filed.
- (b) Within Ninety (90) days of commencement of construction, Company shall have progressed in its construction schedule to the point where service is available to ninety-five per cent (95%) of the residential units existing in the Developed Area at the time of passage of this Ordinance.
- (c) The Company's transmission and distribution system poles, wires and appurtenances shall be located, erected and maintained so as not to endanger or interfere with the lives of persons, or to interfere with new improvements the City may deem proper to make, or hinder unnecessarily or obstruct the free use of alleys, street-bridges, canals or other public property. Company will bore under streets, sidewalks, driveways, and other paved surfaces whenever possible in installing its transmission lines rather than making surface cuts. Wires and cables will be underground in all cases unless there is a pre-existing telephone or electric power line.
- (d) It is the stated intention of City that all holders of public licenses, permits, and franchises within the corporate limits of City shall cooperate with Company wherever possible and wherever such usage does not interfere with the normal operation of said poles and pole lines, so that the num-

ber of new or additional poles constructed by Company may be minimized. To the extent that it is within the City's power to do so, the City hereby grants the right, privilege and authority to the Company to lease, rent, or in any other lawful manner obtain the use of towers, poles, conduits, lines, cables and other equipment and facilities from any and all holders of public licenses and franchises within the City, and to use on such terms as agreed upon with such parties, such towers, poles, conduits, lines, and cables and other equipment and facilities.

- (e) Company shall extend to City, free of expense, joint use of any and all poles owned by it for any proper municipal purpose insofar as may be accomplished without interference with the use and enjoyment of Company's own cables and fixtures. City shall hold Company harmless from any and all actions, causes of action or damage caused by the placement of City's wires or appurtenances upon the poles of Company.
- (f) Company shall have the authority, subject to the supervision and direction of the City, to trim trees over and overhanging all streets, alleys, easements, sidewalks and other public places within City so as to prevent the branches of such trees from coming into contact with the facilities of the Company.
- (g) All transmission distribution structures, lines and equipment erected by Company within the City shall be so located as to cause a minimum of interference with the rights and reasonable convenience of property owners who adjoin any of the said streets. The cable television system shall be constructed and operated in compliance with all City, County, State and national construction and electrical codes and shall be kept current with new codes.

- (h) Whenever the City shall require the relocation or reinstallation of any property of Company in any of the streets of the City, it shall be the obligation of Company upon sixty (60) days notice of such requirement to immediately remove and relocate or reinstall such property as may be reasonably necessary to meet the requirements of the City. Such relocation, removal or reinstallation by Company shall be at the sole cost of Company.

SECTION 6: STANDARDS AND REQUIREMENTS.

- (a) Company will design a two-way community antenna transmission system which will conform to the highest present state-of-the art in the field of closed circuit television transmission. The system will have the ability to provide distribution of television signals, FM signals and locally originated programming. The system design concept will be a full forward thirty-six (36) channel design with capability of four (4) return and data channels within the same design (enabling 2-way service in the future). The return signal can be activated with the insertion of an additional modulator at the origination point and modules at the appropriate amplifiers. The system will utilize Scientific-Atlanta Series 6500 Sub-Split Electronics.
- (b) Construction, maintenance and operation of the transmission distribution system, including house connections, shall be in accordance with the applicable rules and regulations of the FCC and any applicable state, county or city statute, Ordinance, rule or regulation, and shall conform to the provisions of the National Electrical Safety Code prepared by the National Bureau of Standards, the National Electrical Code of the National Board of Underwriters. The system shall be adequately

grounded according to the best cable industry practices.

- (c) In the maintenance and operation of the television transmission and distribution system, and in the course of any new construction or addition to its facilities, the Company shall proceed so as to cause the least possible inconvenience to the general public. Any opening or obstruction in the streets or other public places made by the Company in the course of its operations shall be guarded and protected at all times by placement of adequate barriers, fences or boardings, the bounds of which, during periods of dusk and darkness, shall be clearly designated by warning lights.
- (d) In case of any disturbance of pavement, sidewalk, driveway or other surface, Company shall, at its own expense and in the manner approved by City, remove, replace and restore all pavement, sidewalk, driveway or surface so disturbed in as good condition as before said work was commenced. Upon failure of the Company to commence, pursue or complete any work required by law or by the provisions of this Ordinance to be done in any street or public place, within a reasonable time and in a reasonable manner, the City Building Department may, at its option, cause such work to be done and the Company shall pay to the City the cost thereof in itemized amounts reported by the City Building Department to the Company within thirty (30) days after receipt of such itemized report. Company will post and keep in effect all all times during the period of this franchise a good and sufficient surety or cash bond in the amount of Five thousand and 00/100 dollars conditioned upon Company's performance of this sub-section.

- (e) Company shall provide such signals of television broadcast stations as it is required to carry under Rules, Regulations and Orders of the FCC and such additional signals as it may apply for and be authorized to provide by the FCC.
- (f) Company shall conduct performance tests in accordance with the requirements of Section 76.601 or any successor section of the FCC's Rules, as these requirements may apply from time to time.
- (g) The performance of Company's cable television system shall meet the technical standards set forth in Section 76.605 or any successor section of the FCC's Rules, as those standards may apply or be extended from time to time.
- (h) A full two-way system with fire, police and medical alarm service will be provided within 6 months from the date Company has received a written commitment for such service from at least 500 of the owners of residential units within the city limits of the City of Coconut Creek. For purposes of determining whether or not the threshold number of prospective customers has been reached, Company will conduct a survey of the residences and complete same within six months from the effective date of this franchise; and will repeat such survey at least once each year thereafter until the two-way system is in operation. For purposes of verifying the results of such survey or surveys, the City of Coconut Creek will be furnished with copies of all documents utilized by Company in conducting the survey together with copies of all signed requests for service.

SECTION 7: SERVICE

- (a) Company shall maintain and operate its system and render efficient service.

- (b) Whenever it is necessary to shut off or interrupt service for the purpose of making repairs, installations or adjustments, Company shall do so at such times as will cause the least amount of inconvenience to its Subscribers, and unless such interruption is unforeseen and immediately necessary, it shall give reasonable notice thereof to its Subscribers.
- (c) The Company agrees and binds itself to extend its lines to any "Developed Area" and to serve any and all applicants for CATV service whose dwellings or places of business are located within the "Developed Area" and who in good faith have signified their willingness to subscribe for such CATV service.
- (d) The Company shall have the right to prescribe the reasonable service rules and regulations for the conduct of its business, not inconsistent with the provisions of this Ordinance. The Company shall have the responsibility of interpreting and administering such rules and regulations on a fair and equitable bases.
- (e) Service calls will be made within 48 hours of request, free of service charge.
- (f) Requests for termination of service will be honored immediately.
- (g) Company will maintain service representatives on twenty-four (24) hour call duty, including weekends and holidays. Emergencies or system malfunctions will receive immediate attention.

SECTION 3: RATES

- (a) The Company shall have the right to charge and collect compensation from all Subscribers, except those municipal buildings granted free service as prescribed by this Ordinance. To the extent per-

mitted by State and Federal law, the City shall have the right and jurisdiction to approve initial rates as well as rate increases requested by the Company for basic cable T.V. service. Initial rates for basic cable T.V. service and installation as approved by the City are attached in "Schedule A". These rates have been approved as fair and reasonable charges for the services to be rendered.

- (b) Upon a written request by the Company to increase the rates established in "Schedule A", the City may require a public hearing which shall be held within thirty (30) days of such written request. The City shall then have an additional thirty (30) days within which to render a decision approving, or disapproving the rate increases. If such decision is not rendered by a majority vote of City Council within sixty (60) days of the initial request, such request will be deemed approved. Further, it will not be necessary for the Company to seek approval of the basic cable rate to the extent that the basic cable rate is not increased more than one time in any twelve month period in accordance with the cumulative increase, if any, in the cost of living based upon the Consumer Price Index for All Urban Consumer United States Average (hereinafter called the "Index") published by the Bureau of Labor Statistics of the United States Department of Labor. The increase shall be computed as follows:

1. The Index number for the U.S. for "All Items" for the month that this Ordinance is adopted shall be the Base Index Number and the corresponding Index Number for the same month of each succeeding year shall be the Current Index Number.
2. The Base Index Number shall be subtracted from the Current Index Number. The result-

ing difference shall be divided by the Base Index Number and the resulting quotient shall be multiplied by one hundred. Any resulting positive number shall be deemed to be the cumulative percentage of increase in the cost of living.

3. The permissible increase in rates shall be the product of such rate multiplied by the cumulative percentage of increase in the cost of living. Any rate increase made pursuant to this proviso shall be immediately filed with the City Clerk together with all supporting data to justify such increase without City approval. In the event the City Council should determine that such increase may not be justified, a public hearing will be held within 45 days of date of filing with City. Company shall have the burden of proving to City's satisfaction the justification of such increase.

- (c) There will be no monthly service charge for any period of time when service is not available through no fault of the consumer. An installation charge will not be assessed for a standard installation on the first two outlets for any residence during the initial installing period in any area of the City when service in such area first becomes available. The free installation period shall be in effect for one year after commencement of construction.

SECTION 9: PUBLIC SERVICE. The Company shall provide a free installation and provide basic service at no charge to all municipal buildings within the city limits upon request by City Council.

SECTION 10: INSURANCE. The Company shall indemnify and save City harmless from and against all claims for injury and damage to persons or property

caused by the construction, erection, operation, and maintenance of any structure, equipment, appliance or product used pursuant to the authority granted herein. Company shall keep in full force and effect during the term of this franchise or extension thereof comprehensive public liability insurance policies with liability limits of \$100,000 for property damage, \$300,000 for personal injury to each person, and \$300,000 for each accident. Company shall file a certificate of insurance evidencing the issuance of such policy, with City. The foregoing insurance contract shall require thirty (30) days written notice of any cancellation to both City and Company.

SECTION 11: LENGTH OF TERM.

- (a) The rights granted hereunder shall be exclusive and shall take effect and be in full force from and after the date of acceptance by the Company, and shall continue in full force and effect for a period of *20 years* from the date of this Ordinance.
- (b) Company shall have the option to renew this franchise for an additional period of twenty (20) years.

SECTION 12: FRANCHISE FEE.

- (a) The City shall receive, as a franchise fee, a sum equal to three per cent (3%) of the Gross Subscriber Revenues of the Company.
- (b) Within ninety (90) days of the close of business at the end of the Company's fiscal year, the Company shall deliver to the City Clerk, payments of the franchise fee. All such payments shall be based upon the fiscal records of the Company for the preceding fiscal year or portion thereof.
- (c) The City shall have the right to inspect Company's records showing the gross subscriber revenues from which its franchise payments are computed and

shall have the right of audit and recomputation of any and all amounts paid under the franchise.

- (d) All books and records of Company concerning its operations within the City shall be made available for inspection and audit by the City of Coconut Creek or its designate within thirty (30) days after any request for such inspection or audit shall be made.
- (e) In the event the applicable FCC regulations should be amended to permit a franchise fee in excess of the three per cent (3%) allowable at the time of the passage of this Ordinance, the fee set forth above in Section 12(a) may be increased by the City Council.

SECTION 13: THEFT OF SERVICE.

- (a) From and after the effective date of this Ordinance it shall be unlawful for any person, firm, partnership, association, corporation or organization of any kind ("Person") to make or use any connection, whether physically, electrically, acoustically, inductively or otherwise, with any wire, cable, conduit, apparatus or equipment of a cable television system with intent to enable himself, or others to receive or use any signal without the consent of, or payment to, the cable television system owner. It shall be unlawful for any Person to willfully tamper with, remove or damage, or cause to be tampered with, removed or damaged, any wire, cable, conduit, apparatus or equipment of a cable television system without the consent of the cable television system owner.
- (b) The existence of any of the conditions with reference to wires, cables, conduits, apparatus or equipment described in Subsection (a) above is presumptive evidence that the Person receiving or using any signal by means of such condition,

has created or caused to be created the condition so existing with intent to receive or use such signal without payment to the cable television system owner.

SECTION 14: PREFERENTIAL OR DISCRIMINATORY PRACTICES PROHIBITED.

Company shall not as to rates, charges, services facilities, rules, regulations or in any other respect make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, provided, however, connection and service charges may be waived or modified during promotional campaigns of Company.

SECTION 15: REVOCATION OF FRANCHISE.

- (a) In addition to all of the rights and powers reserved or pertaining to the City, the City reserves as an additional, separate and distinct power the right to terminate the franchise and all rights and privileges of Company hereunder in any of the following events or for any of the following reasons:

1. Company shall by act or omission violate any material term or condition of this Ordinance and not cure any such violations within the time limits set forth below. The City will give Company sixty (60) days written notice of any such violations, and Company will have the sixty (60) days provided for in the notice to cure any violations, provided, however, that with respect to any violations not susceptible of being cured within said sixty (60) day period, the time for the Company to cure any such violations shall be extended for as long as is necessary to cure such violations if Company commences promptly and proceeds diligently to cure such violations.

2. Company becomes insolvent, unable or unwilling to pay its debts or is adjudged a bankrupt.
- (b) Company shall not be declared in default or be subject to any sanction under any provision of this Ordinance in any case in which performance of any such provision is prevented for reasons beyond its control.

SECTION 16: PROCEDURES.

- (a) Any inquiry, proceeding, investigation or other action to be taken or proposed to be taken by the City in regard to Company's cable television system shall be taken only after thirty (30) days written notice to the Company and an additional thirty (30) days public notice of such action or proposed action is given.
- (b) The public notice required by this Section shall state clearly the proposed action to be taken, the time provided for response and the person or persons in authority to whom such responses should be addressed, and such other procedures as may be specified by the City. Company shall be a necessary party to any proceedings specified by the City.

SECTION 17: INVESTIGATION AND RESOLUTION OF COMPLAINTS.

- (a) Company shall maintain a business office accessible to residents of the City of Coconut Creek for the investigation and resolution of all complaints regarding the quality of service, equipment, malfunctions and similar matters. Residents of the City shall be able to communicate with the business office without incurring long distance toll charges.
- (b) In the event that a complaint or dispute about cable television services is not resolved by Com-

pany, it may be submitted to the City Clerk in writing and shall contain: (1) the name and address of the complainant; (2) the name of the cable system against which the complaint is made; (3) a complete statement of facts upon which the complaint is based and (4) a description of the complainant's efforts to resolve the complaint with Company. Upon receipt of any such complaint, the City Clerk will forward a copy to Company. Within such time as may be prescribed by the City Manager, Company may file a written statement in response to the Complaint. The City shall then have the power to make any further investigation of the complaint it deems desirable, to conduct a public hearing on the complaint if it deems such hearing to be desirable, and to resolve the issues raised by the complaint.

SECTION 18: MINIMUM CHANNEL CAPACITY AND PROVISION OF ACCESS CHANNELS.

Company shall comply with the channel capacity, equivalent bandwidth, and access channel requirements and other applicable requirements of the rules and regulations of the FCC, as those requirements may be amended from time to time, unless the FCC waives those requirements. Grantee is authorized to operate its access channels in the City on a shares basis with other nearby communities if authorized to do so by the FCC.

SECTION 19: MODIFICATION OF FCC RULES.

Any modification or amendment of the applicable rules and regulations of the FCC shall, to the extent applicable, be considered as part of any franchise granted pursuant hereto as of the effective date of the amendment made by the FCC and shall be incorporated in this Ordinance by reference as the same may be adopted from time to time.

SECTION 20: ASSIGNMENT.

The franchise may not be sold, assigned or transferred to any other person, corporation or other entity without first obtaining the written approval of the City Council, which shall not be unreasonably withheld; provided, however, provisions of this section shall not apply to a transfer in trust, mortgage, or any other transfer to secure indebtedness.

SECTION 21: SUPPLEMENTAL PROVISIONS.

In addition to the requirements of the Company otherwise contained herein, the Company shall:

- (a) Provide a subscription television channel, or channels, with special programming as a supplement to subscribers of the basic service, which channels shall be made available to all subscribers on an optional basis at a rate or rates to be determined by the Company for each such subscription television channel.
- (b) Make available to the City, without charge, cablecast time on a channel controlled and operated by the Company.
- (c) Make available, without charge, to the community, a cablecast time on a channel controlled and operated by the Company which shall be available on a reserved basis for local organizations domiciled or doing business in the City, provided said users, shall at their expense, provide the necessary transmitting equipment for said channel. In the event special receiving equipment is required as a result of said use, then and in that event the granting authority, at its expense, shall provide such specialized receiving equipment.
- (d) Make available, without charge, to all organized educational institutions, domiciled or doing business in the City, a cablecast time on a channel

controlled and operated by the Company for the purpose of providing educational television to handicapped individuals confined to their homes. Said educational institutions shall provide, at their expense, the necessary transmitting equipment for said channel. In the event special receiving equipment is required as a result of said use, then and in that event, said educational institution, at their expense, shall provide such specialized receiving equipment. The programming material shall be furnished by the educational institution utilizing the channel.

SECTION 22: ACCEPTANCE.

The franchise granted hereunder shall be accepted by Company by written acknowledgment filed with the City not later than thirty (30) days after final passage of this Ordinance.

SECTION 23: SEVERABILITY.

If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held illegal, invalid or unconstitutional by the decision of any Court of competent jurisdiction or the FCC, such decision shall not affect the validity of the remaining portions thereof. The City hereby declares that it would have passed this Ordinance and each section, subsection, sentence, clause or phrase hereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared illegal, invalid or unconstitutional. The invalidity of any portion of this Ordinance shall not abate, reduce or otherwise affect any consideration or other obligation required by the City or the Company of the franchise granted hereunder.

SECTION 24: PUBLIC HEARING.

The City acknowledges that it did conduct a full, open and public hearing upon prior notice and opportunity of

all interested parties to be heard, and further, the City gave careful consideration to the qualifications of all applicants, including their legal, character, financial, and technical qualifications and adequacy and feasibility of their construction arrangements.

SECTION 25: EFFECTIVE DATE.

This Ordinance shall take effect and be in full force and effect upon the filing of the written acceptance by Company as set forth above.

PASSED FIRST READING THIS 13 DAY OF December, 1979.

PASSED SESOND READING THIS 10 DAY OF January, 1980.

PASSED THIRD READING THIS 24 DAY OF January, 1980.

/s/ Joseph Merendino
JOSEPH MERENDINO
Mayor

ATTEST:

/s/ Angela A. Bender
ANGELA A. BENDER
City Clerk

SCHEDULE A

RESIDENTIAL RATES

First Outlet

Installation Charge	\$29.95
Basic Monthly Service Charge	\$ 7.95

Additional Outlets (each)

Installation Charge	\$14.95
Basic Monthly Service Charge	\$ 2.95

COMMERCIAL RATES

Installation Charge—based upon time and material cost

Basic Monthly Service Charge—First Outlet	\$ 7.95
Additional Outlets (each)	\$ 2.95

MISCELLANEOUS

Reconnect Charge (wiring in place)	\$14.95
Relocate Outlet	\$14.95